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NO. 1156

IN THE

Supreme Court of the United States

October Term, 1967

JOSE ESCOBAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOSE ESCOBAR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jose Escobar, Petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in the above styled cause has not yet been reported. A true copy is attached as Appendix B, at Pages 20 to 31.

GROUNDS OF JURISDICTION

The opinion and judgment of the Court of Appeals was entered under date of December 18, 1967. On December 27, 1967, Chief Judge John R. Brown extended the time for filing petition for rehearing to and including January 20, 1968. Petition for rehearing was filed January 18, 1968. It was denied on February 1, 1968. (R. IV, 672-686, 687, 688-693, 725).

Jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner was charged and convicted under §7206(1) of the *Internal Revenue Code of* 1954, 26 U.S.C.A. 7206 (1), a *felony* statute for alleged false statements in his income tax returns. On the same facts he could have been prosecuted under §7207 of said Code, 26 U.S.C.A. 7207, a *misdemeanor* statute. From the inception Petitioner objected to this prosecutorial choice by the Department of Justice. The indictment did not allege the *filing* with the Internal Revenue Service of the tax returns in issue. Though the prosecution was for alleged false statements in the returns made under the penalties of perjury, the trial court refused to instruct the jury on the "two-witness" rule applicable to perjury prosecutions. The questions presented for review thus are:

I. (A) Whether in the discretion of the District Attorney Petitioner could be prosecuted and sentenced under the felony statute, 26 U.S.C.A. 7206(1) for conduct also punishable as a misdemeanor under 26 U.S.C.A. 7207?

(B) Whether *Achilli v. United States,* 353 U.S. 373, 77 S.Ct. 995, should be reexamined in the light of the subsequent holding in *Sansone v. United States,* 380 U.S. 343, 85 S.Ct. 1004, that the overlapping misdemeanor statute, §7207 of the *Internal Revenue Code* of 1954 applies to income tax violations?

II. Whether under the Sixth Amendment an indictment based on 26 U.S.C.A. 7206(1) must allege as an essential element of the venue of the offense the filing with the Internal Revenue Service of the documents containing the alleged perjury?

III. Whether in a prosecution under 26 U.S.C.A. 7206 (1) for alleged perjurious statements to the Internal Revenue Service the Defendant is entitled to an instruction on the "two-witness" rule applicable to perjury prosecutions as decreed in *Weiler v. United States,* 323 U.S. 606, 65 S.Ct. 548?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"26 U.S.C.A. 7206. *Fraud and false statements*
Any person who—

(1) *Declaration under penalties of perjury*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together

with the costs of prosecution. Aug. 16, 1954, C. 736, 68A Stat. 852."

"26 U.S.C.A. 7207. *Fraudulent returns, statements or other documents*

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047(b) or (c) to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

"26 U.S.C.A. 6065. *Verification of returns*

(a) Penalties of perjury—Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

Sixth Amendment, Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."

STATEMENT OF THE CASE

Petitioner was indicted and prosecuted for alleged perjurious statements in his personal Income Tax Returns for the calendar years 1957, 1958, 1959 and 1960. He was acquitted on Count One, but convicted and sentenced for *felony* violations on the other three.

The prosecution was brought under the *felony* statute, 26 U. S. C. A. 7206(1). It could have been brought under the *misdemeanor* statute, 26 U. S. C. A. 7207. Before trial Petitioner filed his motion to require the Government to proceed only under the *misdemeanor* statute, 26 U. S. C A. 7207. (R. II, 587-589). This point was repeatedly reurged in motions for judgment of acquittal at the conclusion of the Government's evidence (R. II, 457-458), at the conclusion of all the evidence (R. II, 484), and renewed after verdict (R. II, 615). It was again reurged in Petitioner's motion in arrest of judgment (R. II, 622-623), in his motion for new trial (R. II, 628), and in his motion for suspension of imposition of sentence (R. II, 640). Before the Court of Appeals Petitioner's briefs argued the point extensively. The Court of Appeals did not write on the point.

Objections and exceptions to the indictment raised the issue that it did not allege as an essential element of the offense the *filing* of the tax returns with the Internal Revenue Service. (R. II, 547)* This issue was reurged in motions for judgment of acquittal at the conclusion of the Government's evidence (R. II, 457), at the conclusion of all the evidence (R. II, 484), renewed after verdict (R. II, 615), in Motion in Arrest of Judgment

*A true copy of the indictment is attached as Appendix A, at Pages 17 to 19.

(R. II, 619-620), and in Motion for New Trial (R. II, 628). The issue was extensively briefed before the Court of Appeals.

Petitioner timely presented his Requested Charge No. I, requesting an instruction on the "two-witness" rule applicable to perjury prosecutions (R. III, 2). The requested instruction read:

> "In this connection I further instruct you that in a prosecution of this kind the falsity of the Defendant's belief must be proved by the sworn testimony of at least two witnesses testifying in open court as to the falsity of Defendant's belief, or by the testimony of one witness testifying as to the falsity of the Defendant's belief, corroborated by other evidence in the case." (R. III, 2).

This requested instruction was expressly refused (R. II, 487). No instruction was given on the "two-witness" rule. The refusal and failure to so instruct was properly preserved in Petitioner's motion for new trial (R. II, 624). The point was thoroughly briefed before the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

The Issue of Prosecutorial Choice of Overlapping Felony and Misdemeanor Statutes

For more than a decade the Constitutionality of a prosecutor's being empowered to choose the more onerous of overlapping statutes under which to prosecute has seriously concerned both this Court and various judges of the Courts of Appeal. This Court granted cer-

tiorari on the precise point here presented in the case of *Achilli v. United States*, 353 U.S. 373, 77 S.Ct. 995.* The conviction was affirmed, however, on the conclusion that the misdemeanor statute then in issue, §3616(a) of the *Internal Revenue Code* of 1939, 26 U.S.C.A. 3616(a) as then codified, had been impliedly repealed and did not apply to income tax violations.

However, *Achilli* created problems from the time of its pronouncement, due to the fact that after the conviction therein, but before the opinion, Congress reenacted former §3616(a), with slight changes, as §7207 of the *Internal Revenue Code* of 1954. Thereafter this Court granted certiorari to consider §7207 on lesser-included offense instructions and held that it was applicable to income tax violations. *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004 ("We conclude that §7207 is applicable to income tax violations").

Because of the decision in *Sansone*, litigants and the Courts are again faced with the major issue that justified the granting of certiorari in *Achilli:* Prosecutorial choice between the overlapping felony and misdemeanor statutes, §§7206(1) and 7207. This question of general importance to the enforcement of the income tax is now no longer answered by *Achilli.*

Although this point was vigorously urged by Petitioner before the Court of Appeals below, it wholly failed to discuss the issue. But the effect of the enactment of §7207 on the issue of prosecutorial choice troubled the Court of Appeals for the Eighth Circuit even before the decision in *Sansone*; see both the majority and dis-

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* See also *Binion* and *Costello v. United States*, 352 U.S. 1028, 77 S.Ct. 642.

senting opinions in *Janko v. United States* (8th Cir.) 281 F.2d 156 (rev. *per curiam* 366 U.S. 716, 81 S.Ct. 1662) and the comments in *Dillon v. United States* (8th Cir.) 218 F.2d 97. Unless settled by this Court, litigants and the courts below will continue to be in doubt as to the effect of the overlapping of §§7206(1) and 7207, and prosecutorial choice between them.

Though related to a different set of overlapping statutes, the fundamental Constitutional issue of prosecutorial choice troubled Justices of this Court in *Rosenburg v. United States,* 346 U.S. 271, 73 S.Ct. 1152. There Mr. Justice Frankfurter stated the rationale of the Justices opposing prosecutorial choice:

> "Surely it needs only statement that with such a drastic difference in the authority to take life between the Espionage Act and the Atomic Energy Act, it can not be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon the recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise in self-stultification."

Mr. Justice Black, joined by Mr. Justice Douglas, elaborated on the Constitutional issues in his dissent in *Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685, an income tax case; we quote selected excerpts:

> "The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say

whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.

"A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.

* * *

"A Congressional delegation of such vast power to the prosecuting deparement would raise serious constituional questions."

The danger of prosecutorial choice as to future litigants is demonstrated by the practical effect of its exercise on Petitioner Escobar. He being a lawyer, the choice of the felony statute imposed upon him a penalty and punishment not defined by federal law, immediate compulsory disbarment from his chosen profession. Tex. Civ. Stat. Article 11, Texas State Bar Act, Article 12; *State of Texas v. Estes* (Tex.) 109 S.W.2d 167. This result would not exist from a misdemeanor conviction. Such a serious result should not be left to the caprice of the district attorney.

Concern over the fundamentals of the Constitutionality of prosecutorial choice has repeatedly arisen in the Court of Appeals for the District of Columbia because of the overlapping of the general Federal Narcotics Statutes, imposing severer penalties, with those enacted for the District of Columbia imposing lesser penalties. See the dissents of Chief Judge Bazelon, sometimes joined by Judges Fahy, Washington, and Wright in

Lloyd v. United States (D. C. Cir.) 343 F.2d 242, 244-245; *Hutcherson v. United States* (D. C. Cir.) 345 F.2d 964, 972-977; and *Henderson v. United States* (D. C. Cir.) 349 F.2d 712.

In *Lloyd v. United States,* supra, Chief Judge Bazelon posed the important Constitutional questions as follows:

> "I find the issue of equal protection raised by appellant both difficult and disturbing."
>
> * * *
>
> "The wide disparity in sentencing rigor under the two sets of statutes raises serious questions whether the permissible bounds of prosecutorial discretion have not been exceeded. What standards, if any, are applied in choosing between the statutes? Do these standards have a firm place in statute or administrative practice? Are they constitutionally permissible?"

Subsequenly in *Hutcherson v. United States,* supra, Chief Judge Bazelon made the point that in exercising prosecutorial choice the prosecuting attorney infringes on the prerogatives of the judiciary by making a sentencing decision:

> "When the prosecutor 'chooses' a mandatory minimum sentence, he makes a sentencing decision, without either sentencing information or expertise in sentencing."

In *Henderson v. United States,* supra, Chief Judge Bazelon questioned the Constitutionality of the basis used by prosecutors for their choices:

> "At oral argument I asked Government counsel why this Appellant, a non-addict found with large

> quantities of narcotics, was treated so much better than addicts accidentally found in possession of $40 worth of drugs, or persuaded into making a $10 sale to a police undercover agent or informer. Government counsel offered this explanation: the United States Attorney may have reason to think that such addicts are substantial operators, but may have no way to prove it. Such reasoning is at the heart of the tyranny in the invisible prosecutorial choice he is permitted to make. I am dismayed at the proposition that a prosecutor may sentence offenders to jail terms longer than appears to be warranted by the transactions with which they are charged, because he *thinks* they are involved in bigger stuff—and that this choice may never be reviewed." (Emphasis by Chief Judge Bazelon).

This question presented is of great importance to the enforcement of the income tax laws and to the rights of defendants prosecuted for alleged false statements in their income tax returns. It is further of great importance to the due administration of criminal justice.

II.

The Sufficiency of the Indictment

It is important to the administration of criminal justice and to the enforcement of the income tax laws for this Court to determine whether under the Sixth Amendment an indictment based on 26 U.S.C.A. 7206(1) must allege the essential venue fact of the *filing* of the income tax return. If an indictment contains only the allegation of the subscription of the return, there is always the potential problem that the return may be subscribed in one district but be filed in a different district. But as hereinafter demonstrated it seems to be settled law that the offense for

venue purposes is not complete until the return is *filed*. Failure to allege the *filing* creates problems of the admissibility of evidence to prove the essential venue fact of *filing*.

This Court has repeatedly held that where an offense relates to the filing of false or fraudulent documents with a Governmental agency the offense is not completed for venue purposes under the Sixth Amendment until and unless the document is actually delivered to, and received and filed by, the agency. *Travis v. United States*, 364 U.S. 631, 81 S.Ct. 358; *United States v. Lombardo*, 241 U.S. 73, 36 S.Ct. 508; See also *Sansone v. United States*, 380 U.S. 343, 354, 85 S.Ct. 1004, 1011. There are numerous decisions to the same effect by the District Courts and Courts of Appeal. See *United States v. Mathis* (D.C.N.J.) 28 F. Supp. 582, 584. ("I am convinced that the offense was committed, if at all, on the date of *filing*"); *United States v. Newton* (D.C.W.D. Va.) 68 F. Supp. 952 (affd. 162 F.2d 795) ("I do not believe he would have committed a crime unless and until the document was actually *filed*."); *United States v. Erlich* (D.C.E.D. Pa.) 104 F. Supp. 223, 225 ("The crime, if any, was committed on the *filing* of the returns . . ."); *United States v. Horwitz* (D.C.N.D. Ill.) 247 F. Supp. 412; *Guzik v. United States* (7th Cir.) 54 F.2d 618, 619 ("The crime is complete when the violator has, as in this instance, knowingly and willfully *filed* fraudulent returns with intent to evade a part or all of the tax."); *Reass v. United States* (4th Cir.) 99 F.2d 752 (". . . It is only when they are communicated to the lending bank that a crime takes place."); *Cave v. United States* (8th Cir.) 159 F.2d 464, 467 ("The crime denounced by §145(b) of willfully attempting to defeat or evade the tax is complete when the taxpayer knowingly

files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States."); *Myres v. United States* (8th Cir.) 174 F.2d 329, 334 ("The crime is complete when the violator has, as in this instance, knowingly and willfully *filed* fraudulent returns with intent to evade a part or all of the tax."); *Butzman v. United States* (6th Cir.) 205 F.2d 343 ("No crime was committed by Butzman until the application was *filed*. No crime would have been committed by Craig if the application had not been *filed*."); *United States v. Valenti* (3rd Cir.) 207 F.2d 242 ("It follows, therefore, that the *actual filing* of a false affidavit with the Board is necessary to constitute the crime denounced by Section 1001 and that constructive filing by delivery to the post office is not enough."); *Benham v. United States* (5th Cir.) 225 F.2d 472 (". . . but the crime was not complete until the return was *filed*"). (Empasis is added to the above quotations.)

Under this myriad of authorities the *filing* of the return is an essential element of the venue under the Sixth Amendment. It is a proper corollary that the Sixth Amendment requires that the indictment must allege this essential venue element, that such element is within the requirements of *United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113.

III.

The "Two-Witness" Perjury Rule

Congress requires an Income Tax Return to be verified by a written declaration that it is made under the penalties of perjury, 26 U.S.C.A. 6055(a). Congress penalizes false statements made in such returns under the penalties of

perjury by criminal sanctions of felony grade, 26 U.S.C.A. 7206(1). It is important therefore to the administration of criminal justice and to the enforcement of the income tax laws for this Court to determine whether the traditional "two-witness" rule applicable to perjury cases applies to prosecutions for violations of 26 U.S.C.A. 7206(1). It is reasonable to anticipate that the question will repeatedly arise.

The "two-witness" rule is firmly embedded in Federal law; an instruction on it is required, when properly requested, in all perjury prosecutions. *Weiler v. United States*, 323 U.S. 606, 65 S.Ct. 548:

> *"It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment.* Cf. Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed 257. *The refusal of the trial judge to instruct the jury as requested was error."* (Emphasis added).

And this Court has applied the rule to prosecutions for subornation of perjury for the reason that falsity is the *corpus delicti* of that offense. *Hammer v. United States*, 271 U.S. 620, 46 S.Ct. 603. Similarly the Fifth Circuit has expressly held that a prosecution under 26 U.S.C.A. 7206(1), the statute in issue, is similar to a perjury prosecution. *Hoover v. United States* (5th Cir.) 358 F.2d 87 ("Section 7206(1) is similar in nature to a perjury prosecution which makes the gravamen of the offense false swearing as to a material matter . . .").

Though swearing before a Notary is no longer required for Income Tax Returns, the verification under the penalties of perjury creates the sanctity of an oath. *Cohen v.*

United States (9th Cir.) 201 F.2d 387. ("We think the Congressional intent in enacting §3809 [now §6065(a)] was merely to simplify the task of both taxpayer and the Bureau of Internal Revenue by permitting a verified return to be substituted for a notarized return in certain situations.") Consequently, material false statements in an income tax return is false swearing. This Court has classified false swearing as within the category of perjury. *United States v. Smull,* 236 U.S. 405, 35 S.Ct. 349.

It is inconceivable that Congress by imposing the penalties of perjury intended to deny the defensive rights inherent in a prosecution for perjury. Assuredly such an intent would have been manifested by express provision of the statute. See the comments by this Court that falsity in false swearing affidavits must be proved by the perjury rules. *American Communications Assn. v. Douds,* 339 U.S. 382, 411, 70 S.Ct. 674, 690.

This question should be determined that trial courts, prosecutors, and defendants may know in the future the necessity or no for instructing on the "two-witness" rule.

CONCLUSION AND PRAYER

On the facts and authorities submitted, it is respectfully urged that this Petition for Certiorari presents substantial and important questions for consideration by this Honorable Supreme Court of the United States. It is further respectfully urged that these questions should be resolved to the relief of the Petitioner.

WHEREFORE, Petitioner prays that this Petition for Certiorari be granted to correct the errors of the Honorable Court of Appeals for the Fifth Circuit and of the Honor-

able United States District Court for the Western District of Texas.

Respectfully submitted,

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APPENDIX "A"

United States District Court

WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CRIMINAL NO. 67894
(Vio. 26 USC 7206(1))

UNITED STATES OF AMERICA

VS.

JOSE ESCOBAR

THE GRAND JURY CHARGES:

That on or about April 15, 1958, within the El Paso Division of the Western District of Texas, JOSE ESCOBAR did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Treasury Department Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, which said United States Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said United States Individual Income Tax Return contained the statement and representation that Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1957 in the amount of $6,192.00, whereas, as he then and there well knew and believed, Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1957 substantially in excess of $6,192.00; in violation of Title 26, United States Code, Section 7206(1).

SECOND COUNT

That on or about April 15, 1959, within the El Paso Division of the Western District of Texas, JOSE ESCOBAR did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Treasury Department Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, which said United States Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said United States Individual Income Tax Return contained the statement and representation that Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1958 in the amount of $7,833.00, whereas, as he then and there well knew and believed, Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1958 substantially in excess of $7,833.00; in violation of Title 26, United States Code, Section 7206(1).

THIRD COUNT

That on or about April 18, 1960, within the El Paso Division of the Western District of Texas, JOSE ESCOBAR did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Treasury Department Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, which said United States Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said United States Individual Income Tax Return contained the statement and representation that Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar

year 1959 in the amount of $7,181.00, whereas, as he then and there well knew and believed. Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1959 substantially in excess of $7,181.00; in violation of Title 26, United States Code, Section 7206(1).

FOURTH COUNT

That on or about April 16, 1961, within the El Paso Division of the Western District of Texas, JOSE ESCOBAR did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Treasury Department Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, which said United States Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said United States Individual Income Tax Return contained the statement and representation that Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1960 in the amount of $7,657.00, whereas, as he then and there well knew and believed, Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1960 substantially in excess of $7,657.00; in violation of Title 26, United States Code, Section 7206(1).

A TRUE BILL

_____

FOREMAN

_____

UNITED STATES ATTORNEY

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 23,529

JOSE ESCOBAR, Appellant

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Western District of Texas

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(December 18, 1967.)

Before BELL, GODBOLD and DYER, Circuit Judges.

DYER, Circuit Judge: Appellant was charged in a four count indictment[1] with willfully making and sub-

[1] "That on or about April 15, 1958, within the El Paso Division of the Western District of Texas, Jose Escobar did wilfully and knowingly make and subscribe a United States Individual Income Tax Return, Treasury Department Form 1040, which was verified by a written declaration that it was made under the penalties of perjury, which said United States Individual Income Tax Return he did not believe to be true and correct as to every material matter in that the said United States Individual Income Tax Return contained the statement and representation that Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1957 in the amount of $6,192.00,

scribing false income tax returns for the years 1957, 1958, 1959 and 1960.[2] He was acquitted on Count 1 and found guilty on the other three counts. In his appeal from the conviction on Counts 2, 3 and 4, he seeks reversal because of (1) the failure of the indictment to state an offense; (2) the non-disclosure of the identity of an informer; (3) the refusal of requested instructions; (4) the insufficiency of the evidence; and (5) th estoppel of the appellee by the not guilty verdict as to Count 1. We affirm.

Sufficiency of the Indictment

Each count in the indictment alleges that the defendant did "make and subscribe [an] * * * * income tax return."[3] Appellant urges that the failure to allege the *filing* of a return is a failure to allege an essential element of the offense and that the indictment therefore does not charge a crime against the United States. It is unnecessary for us to attempt to analogize

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whereas, as he then and there well knew and believed, Jose and Mavis E. Escobar of El Paso, Texas, had received taxable income during the calendar year 1957 substantially in excess of $6,192.00; in violation of Title 26, United States Code, Section 7206(1)."

The allegations in Counts 2, 3 and 4 were identical except as to dates and amounts.

[2] 26 U.S.C.A. § 7206(1) provides in pertinent part:
"Any person who * * * wilfully makes and subscribes any return * * * which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00, or imprisoned not more than three years, or both, together with the costs of prosecution."

[3] See note 1, *supra*.

cases decided upon other statutes as appellant would have us do, because this argument is foreclosed by our recent decision in *Hoover v. United States,* 5 Cir. 1966, 358 F.2d 87. There, as here, the indictment alleged "the offense substantially in the language of Section 7206(1), which contains all of the essential elements of the offense and is thus sufficient within the meaning of Rule 7(c), Federal Rules of Criminal Procedure. An indictment alleging an offense substantially in the language of the statute is sufficient unless the words of the statute do not contain all of the essential elements of the offense. *Russell v. U. S.*, 1962, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; *Reynolds v. U. S.*, 225 F.2d 123 (5 Cir. 1955), *cert. denied,* 350 U.S. 914, 76 S.Ct. 197, 100 L.Ed. 801 (1955)." *Id.* at 88; accord *Worthy v. U. S.*, 5 Cir. 1964, 328 F.2d 386, 392.

The Informer's Identity

During the cross-examination of a Special Agent for the Internal Revenue Service, it developed that the investigation of appellant had its genesis with an informer. The appellee advised the court that the informer had only provided information about someone other than the appellant. It was brought out that other members of appellant's law firm were investigated simultaneously and were all convicted of failure to file income tax returns. The court sustained the appellee's refusal to disclose the identity of the informer, but required appellee to submit to the court the name of the informer *in camera,* and announced that if either side should call the informer to testify the court would excuse the jury and notify both sides. The informer was not called.

Appellant claims that he was prejudiced by the non-disclosure of the informer because he could not call unspecified defense witnesses without the risk that he would be placing the informer on the stand. But this ignores the court's representation to counsel that it would notify both sides if the informer was called to testify. Moreover, in the absence of some compelling reason for doing so, disclosure of an informer's identity is generally declined. *Rugendorf v. U. S.*, 1964, 376 U.S. 528, 534-536; *Robinson v. U. S.*, 5 Cir. 1964, 325 F.2d 880, 883.[4] Appellant fails to make any showing that he was "prevented from making his defense without knowledge of the informer's identity." *Firo v. U. S.*, 5 Cir. 1965, 340 F.2d 597, 598.

Requested Instructions on Perjury

Appellant requested and the court refused to instruct the jury on the so-called "two witness rule" and the stringent burden of proof applicable to cases of perjury. Appellant contends that the instructions should have been given because the language of the statute punishes the willful making and subscribing of a false return "which contains or is verified by a written declaration that it is made under the penalties of

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[4] In *Wheeler v. U. S.*, 1 Cir. 1965, 351 F.2d 946, relied on by appellant, there was an improper limitation of defendant's right of cross examination of a witness actually called. *Roviaro v. U. S.*, 1957, 353 U.S. 53, and *Portomene v. U. S.*, 5 Cir. 1955, 221 F.2d 582, cited by appellant are inapposite. In each case the informer was a participant in the sale of heroin. Appellant's suggestion of potential entrapment is not persuasive because entrapment presupposes guilt, yet appellant maintained that he was innocent of the charge. *McCarty v. United States*, 5 Cir. 1967, ...F.2d....., (No. 23,999, June 20, 1967).

perjury."[5] He asserts that the indictment against him charged perjury and that the refusal to give the instructions was reversible error. *Weiler v. U. S.*, 1945, 323 U.S. 606.

Under the "plain meaning rule" of statutory construction it is clear that appellant was not charged with perjury. The statute does *not* say that one who willfully makes a false return "shall be guilty of perjury." In fact, it contains no language indicating that the crime of perjury is involved at all. The language "made under the penalties of perjury" is of purely historical significance.[6] The phrase remains in the present statute as a "catch phrase" or "signpost" to indicate what types of documents are covered by the statute. Without this phrase any document would come within the purview of the statute and it would be identical

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[5] See note 2, *supra*.

[6] At one time, income tax returns had to be made under oath. This was true when *Levin v. U. S.*, 9 Cir. 1925, 5 F.2d 598 was decided. While the oath requirement was still in effect, the predecessor of the present statute, former § 145(c) of the Internal Revenue Code, was enacted. Section 145(c) was added to the 1939 Code by the act of October 21, 1942, 56 Stat. 836 (1942). *Taylor v. U. S.*, 9 Cir. 1950, 179 F.2d 640, 643. It specifically applied to its violation the penalties provided in § 125 of the criminal code, the predecessor of the perjury statute, 18 U.S.C.A. § 1621. The oath requirement was repealed by the act of August 27, 1949, 63 Stat. 667 (1949) codified as 26 U.S.C.A. § 3809 (1952), which statute also repealed § 145(c) of the Internal Revenue Code. The new § 3809(a), which was apparently intended to substitute for § 145(c), was very similar to the present 26 U.S.C.A. § 7206(1). It no longer referred to the penalties in 18 U.S.C.A. § 1621, but the penalty provided for its violation was the same as in the latter section. (5 years and $2,000 fine.) As a part of the Internal Revenue Code of 1954, the present § 7206(1) was enacted, but this time the penalty was changed to a maximum of 3 years' imprisonment and $5,000 fine, plus the costs of prosecution.

(except for penalty) to 26 U.S.C.A. §7207, which is a misdemeanor statute.

When viewed in this light it is understandable that Congress left the phrase in the statute and that the Internal Revenue Service left the statement in its return forms after the statute requiring the returns to be sworn to was repealed.[7] The phrase, outdated though it was, remained to provide an easily discernible limit to the application of §7206(1) and its predecessors. It relieved Congress from having to substitute some new phrase. That it serves no other purpose is evidenced by the fact that perjury requires an oath, *Smith v. U. S.*, 5 Cir. 1966, 363 F.2d 143, 144, and no oath is required in an income tax return. Furthermore, in spite of the "penalties for perjury" language, Congress went on to provide another and much lighter penalty for the offense proscribed by §7206(1), (3 years) than that provided for perjury under 18 U.S.C.A. §1621 (5 years).

Appellant cites no cases, and we have been unable to find any, applying the rules of proof in perjury cases to prosecutions under 26 U.S.C.A. §7206 (1). It is significant that in the most serious of all tax offenses, 26 U.S.C.A §7201 (which proscribes willful attempts to evade and defeat taxes and which carries the heaviest maximum penalty found in the Internal Revenue Code—five years imprisonment and $10,000 fine, plus costs of prosecution) the offense may be proven by circumstantial evidence, *Holland v. U. S.*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. It would be contradictory indeed to accept appellant's argu-

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[7] Of course, the phrase served a definite purpose before the oath requirement was removed.

ment that there must be an application of stricter rules to the lesser offenses under §7206(1).

Finally, appellant urges that we held in *Hoover v. U. S., supra,* that a prosecution under 26 U.S.C.A. §7206(1) is analogous to a perjury prosecution.[8] But read in context, what we said there had reference only to the defendant's contention that the court had failed to charge on the term "material matter." We pointed to the reasoning in the perjury cases as to what subject matter was material. Comparing the element of "material matter" in a prosecution under §7606 (1) with that element in a perjury prosecution does not make the two offenses analogous. We are convinced that the court acted properly in refusing appellant's requested perjury instructions.

Refusal of Lesser Included Offense Charge

Appellant contends that the court erred in refusing to charge that the jury could find him guilty under 26 U.S.C.A. §7207[9] (misdemeanor) even though he was indicted for violating 26 U.S.C.A. §7206(1) (felony). There is an element in §7206(1) which is not in §7207, *i.e.,* the document must contain a statement that it is "made under the penalties of perjury."

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[8] Appellant quotes the following from *Hoover:* "Section 7206(1) is similar in nature to a perjury prosecution which makes the gravamen of the offense false swearing as to a material matter * * *."

[9] 26 U.S.C.A. § 7207 provides in pertinent part: "Any person who willfully delivers * * * to the Secretary * * * any * * * return * * * known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

Section 7207 applies to income tax violations. *Sansone v. U. S.*, 1965, 380 U.S. 343, 349 . . . S.Ct. ..., . . . L.Ed. . . . Since the other statute involved (§7206(1)) also applies to income tax violations, under the rationale of *Sansone*, "the lesser-included offense doctrine applies to these statutes in an appropriate case." *Ibid.*

The question then becomes whether this is "an appropriate case." *Sansone* offers the guidelines:

> But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses.

Id. at 349, 350.

> In other words, the lesser offense must be included within but not, on the facts of case, be completely encompassed by the greater. A lesser-included offense instruction is *only proper when the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.*

Id. at 350 (Emphasis added.)

Accepting these guidelines, the question narrows to whether there is "a disputed factual element" in §7206(1) which is not present in §7207. As pointed out the only difference between the two statutes is in the "made under the penalties of perjury" requirement in §7206(1). If there was any question for the

jury concerning whether some or all of the returns involved here were or were not "made under the penalties of perjury" appellant would have been entitled, under *Sansone,* to the requested charge. However, appellee contends, and appellant does not dispute, that all returns involved here contain the "perjury declaration." Therefore, there was no factual dispute concerning the charged greater offense to be submitted to the jury, *ergo* appellant was not entitled to his requested charge. See *Sansone v. U. S.* at 354-355.

Evidence of Willfulness

Premised on the fact that willfulness is an essential element of the offense charged,[10] appellant argues that the appellee has shown no more than a mere understatement of income and that this showing is inadequate to establish willfulness. We are satisfied, however, that there is more than sufficient evidence to sustain this element of the offense. *Holland v. U. S.,* 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150.

Appellant is a practicing attorney with experience in the tax field. For four consecutive years he understated his income by almost one-half. Evidence of "a consistent pattern of underreporting large amounts of income" may support an inference of willfulness. *Holland v. U. S., supra,* at 139; *Smith v. U.S.,* 1954,348 U.S. 147, 157, 75 S.Ct. 194, 99 L.Ed. 192; *U. S. v. Procario,* 2 Cir. 1966, 356 F.2d 614, 618, *cert. denied* 384 U.S. 1002; *U. S. v. Alker,* 3 Cir. 1958, 260 F.2d 135, 148, *cert. denied* 359 U.S. 906, *rehearing denied* 359 U.S. 950; *Epstein v. U. S.,* 6 Cir., 1957, 246 F.2d 563, 566,

[10] See note 2, *supra.*

cert. denied 355 U.S. 868. Furthermore, appellant was in charge of all phases of the law firm's record keeping and had actual knowledge of the state of the firm's finances. No partnership returns required by 26 U.S.C.A. §6031 were filed during the years in question. A failure to file is admissible on the issue of willfulness. *Hoyer v. U. S.*, 8 Cir. 1955, 223 F.2d 134, 139. Pertinent books and records were not made available to investigators although appellant had been requested to produce all books and records. A savings account kept secret by appellant had grown from $50 in 1956 to $18,000 in 1960 during which time he reported his gross income to be only $38,237.00. At the initial interview appellant told the agents that he merely shared office space with two other lawyers, when it was actually an equal partnership. In the face of all this evidence there is no merit to appellant's contention that the evidence is insufficient to support the element of willfulness.

Appellant's assertion of mistake is also unpersuasive. Claiming that his secretary calculated on an adding machine the amount of his withdrawals from the firm, he argues that if she made an error and appellant relied on the tape to prepare his returns the conviction cannot stand. The tapes were not offered in evidence, nor is there any showing that they were incorrect. Moreover, there was nothing to indicate that appellant relied on such tapes in preparing his return. There is simply no support in the record for appellant's alleged defense of mistake.

Sufficiency of the Evidence

The appellee used the bank deposit—cash expenditures method to prove that appellant understated his income, *i.e.*, total bank account deposits plus items paid out in

currency minus non-income items equals net income for the partnership. *Bostwick v. U. S.*, 5 Cir. 1955, 218 F.2d 790, 794; *Holbrook v. U. S.*, 5 Cir. 1954, 216 F.2d 238, *cert. denied* 349 U.S. 915. The bank account used in the computation was the partnership's trust account in which was deposited receipts from the firm's law practice. The appellee correctly treated the firm as an equal partnership and assigned to appellant one-third of the earnings of the firm. The deposit tickets to the firm's trust account did not disclose the source of the funds deposited and some of the deposit tickets could not be found. The agents eliminated non-income items by analyzing withdrawals from the account and deducting from the total deposits all sums representing settlements, client's funds, court costs and other non-income items. Appellant urges that the bank deposit-cash expenditure method cannot produce an acceptable result here because the non-income items can be eliminated only by an analysis of deposits, not withdrawals. We disagree. The appellee was not required to analyze deposits, because analysis of deposits is a prerequisite to the method only to the extent information of the nature and source of funds included in deposits is in the hands of the government or available within the requirement of pursuing leads. With few exceptions the deposit slips disclosed no such information. (For the same reason there is no merit to the contention that the agents improperly failed to attempt to locate missing deposit slips.) And appellee sufficiently pursued leads. The government made out a prima facie case, and it discharged its obligations to make use of data in its hands and to pursue leads. Appellant, while attacking the government's accounting method produced nothing to refute the government's computations. A detailed analysis of the ap-

pellee's proof would be of no precedential value. A careful review of the record convinces us that the evidence as to appellant's understatement of income in each year for which he was convicted is entirely sufficient.

Acquittal by Estoppel

Because the jury returned a not guilty verdict to the first count of the indictment appellant insists that this must be treated as an acquittal by estoppel to Counts 2, 3 and 4 because there is no additional evidence of willfulness to support the latter three counts. The short answer to this is that even if the verdict is looked upon as inconsistent it would not require a reversal, *Dunn v. U. S.*, 1932, 284 U.S. 390, 393; *Rua v. U. S.*, 5 Cir. 1963, 321 F.2d 140, 143, *cert. denied*, 377 U.S. 969. But the verdict is not inconsistent because the evidence differed on each count. The jury might well have had a reasonable doubt of the appellant's guilt on the first count, but not on the remaining counts.

We have considered and find without merit the other errors complained of by appellant. The judgment of the district court is

AFFIRMED.